(2)

No. 03-794

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE

In The

Supreme Court of the United States

NANCY MITCHELL,

Petitioner,

v.

GREGORY SHAIN, D.D.S.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Whether the rulings and application of California State law made by the California State Appellate Court in its unpublished opinion regarding perceived instructional and procedural errors during the San Diego County, California, Superior Court trial rise to the level of a violation of Petitioner's constitutional rights.

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TEXT

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SUPREME COURT RULE

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STATEMENT OF THE CASE

Petitioner Nancy Mitchell ("Mitchell") underwent substantial dental treatment with Respondent Gregory Shain, DDS ("Dr. Shain"), and his office from July through September 15, 1998. On September 16, 1998, Mitchell informed Dr. Shain that she planned to treat with another dentist. In November, 1999, Mitchell filed a dental malpractice claim in the San Diego County, California, Superior Court ("Superior Court"), alleging professional negligence and lack of informed consent. Trial took place in February, 2001, and resulted in a jury verdict in favor of Dr. Shain and against Mitchell on February 20, 2001. Judgment was entered in favor of Dr. Shain on March 2, 2001. Mitchell filed a Motion for New Trial, which was denied by telephonic ruling on April 19, 2001, and on May 31, 2001, Mitchell filed a Notice of Appeal with the California State Appellate Court ("State Appellate Court"). (Pet. Pages 7-9) On April 7, 2003, the State Appellate Court rejected Mitchell's arguments of instructional and procedural error and affirmed the Superior Court judgment in an unpublished opinion, D035601. (Pet. App. Pages 1-18) On April 22, 2003, Mitchell filed a Petition for Rehearing with the State Appellate Court, which was denied on May 1, 2003. (Pet. App. Page 19) On May 19, 2003, Mitchell filed a Petition for Review with the California State Supreme Court ("State Supreme Court"), which was denied on June 25, 2003. (Pet. App. Page 20) The Remittitur was issued on July 1, 2003. (Pet. App. Page 21) Mitchell timely filed the Petition for Writ of Certiorari ("Petition") on September 22, 2003.

SUMMARY OF ARGUMENT

The attempted thrust of Mitchell's Petition appears to be that the ruling on the instructional and procedural errors raised by Mitchell in the State Appellate Court (1) constitutes a deprivation of her liberty rights and due process rights under the 14th Amendment to the United States Constitution, (2) violates equal protection laws, and (3) abridges her rights under the 1st Amendment to the United States Constitution. Notwithstanding her attempt to frame an argument in constitutional terms, Mitchell essentially has requested that this Court re-examine the evidence presented during the Superior Court trial.

Dr. Shain maintains that review by this Court is not necessary as none of the constitutional issues set forth by Mitchell in the Petition were raised in, let alone decided by, the Superior Court or the State Appellate Court. As this Court stated in *Braxton v. U.S.*, 500 U.S. 344 (1991), "[A] principal purpose for which we use our certiorari jurisdiction, . . . is to resolve conflicts among the Circuit courts of appeals and state courts concerning the meaning of provisions of federal law." [*Braxton*, *supra*, at 347] "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal'". [*Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923)] "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. Rule 10. "Granting of the writ would not be warranted merely to review the evidence or inferences

drawn from it". [*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938)]

Mitchell's Petition has raised no conflicts among Federal and State Court decisions and has nothing to do with the resolution of principles of "importance to the public", as required by *Labor Board*, *supra*, at 502. Mitchell's Petition merely seeks to correct what she envisions as the misapplication of California law by the State Appellate Court. Accordingly, this Court is requested to deny Mitchell's Petition. Review should also be denied because the opinion below was issued by the State Appellate Court, which is not the Court of last resort in California.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE STATE APPELLATE COURT WAS CORRECT AND CONSISTENT WITH CALIFORNIA DECISIONAL LAW

The crux of Mitchell's Petition concerns the various errors she alleges were committed in the Superior Court and the State Appellate Court. The State Appellate Court opinion correctly stated the material facts of the Superior Court case and addressed all issues raised by Mitchell's instant Petition. The State Appellate Court opinion concisely set forth the applicable California law raised by the issues presented to it for review and the decision soundly rested on the matters raised and briefed by the parties.

II. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO NEGLIGENCE PER SE UNDER CALIFORNIA LAW

The State Appellate Court correctly decided the issues relating to negligence per se under the guidelines of California decisional law by carefully and clearly applying the directions mandated in *Daum v. SpineCare Medical Group, Inc.*, 52 Cal.App.4th 1285 (1997). Based on the issues presented to the State Appellate Court for review, that Court appropriately found that the Superior Court did not commit error by preventing Mitchell from establishing a negligence per se theory of liability through the introduction of evidence regarding the expired license of Dr. Shain's dental assistant. (Mitchell concedes that Dr. Shain's assistant was granted "summary judgment for her liability to [Mitchell] on September 7, 2000" (Pet. Page 7) and that the "assistant's liability was demurred out [o]n May 11, 2000" (Pet. Page 13); although Mitchell incorporates "other authorities" (Pet. App. Pages 24-26) into her argument on Pages 12 and 13, she acknowledges on Page 11 that such "authorities" were not introduced during the Superior Court trial) The reasoning applied by the State Appellate Court to the negligence per se issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

III. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTION 6.30

The State Appellate Court correctly decided the issues relating to the propriety of jury instruction pursuant to California Jury Instructions, BAJI (8th ed.) BAJI No. 6.30

(Pet. App. Page 33). The State Appellate Court outlined and correctly adopted the well-established guidelines set forth in *Lawless v. Calaway*, 24 Cal.2d 81 (1944) in determining that the common knowledge exception was inapplicable to the facts of the Superior Court case and that instruction pursuant to BAJI 6.30 was warranted. Moreover, the State Appellate Court appropriately found that because the Superior Court did not err in preventing Mitchell from attempting to establish negligence based on the status of Dr. Shain's assistant's license, that status did not undermine the need for instruction pursuant to BAJI No. 6.30. Finally, the State Appellate Court correctly ruled that instruction under BAJI No. 2.40 (Pet. App. Page 30) allowed the jury to use its common sense in determining the authenticity of Dr. Shain's photographs, notwithstanding the additional instruction pursuant to BAJI No. 6.30. [Despite inclusion in her argument (Pet. Page 20), the State Appellate Court was not asked to and did not address the propriety of BAJI No. 2.04 (Pet. App. Page 29) and BAJI No. 2.02 (Pet. App. Page 29)] The reasoning applied by the State Appellate Court to the BAJI No. 6.30 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

(Dr. Shain notes that the latter part of Section V of the State Appellate Court opinion (Pet. App. Pages 9-12) references BAJI No. 6.06 instead of BAJI No. 6.30)

IV. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTION 6.06

The State Appellate Court correctly decided the issues relating to the refusal by the Superior Court to give

California Jury Instructions, BAJI (8th ed.) BAJI No. 6.06 (Pet. App. Page 31). [Despite inclusion in her argument (Pet. Page 21), the State Appellate Court was not asked to and did not address the propriety of BAJI No. 6.11 (Pet. App. Pages 31-32)] Based on the testimony by Mitchell's expert, coupled with the arguments presented by both counsel at the time of closing argument, it was apparent to the State Appellate Court that both sides accepted Dr. Shain's responsibility for his assistant's treatment of Mitchell. More importantly, the State Appellate Court found that the jury was not misled by the Superior Court's decision not to give the requested instruction. Carefully following the dictates of *Soule v. General Motors Corp.*, 8 Cal.4th 548 (1994), the State Appellate Court properly concluded that Mitchell failed to demonstrate any prejudice by the failure of the Superior Court to give the requested instruction. The reasoning applied by the State Appellate Court to the BAJI No. 6.06 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

V. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO THE PROPRIETY OF CALIFORNIA JURY INSTRUCTIONS 6.35 AND 6.36

The State Appellate Court correctly decided the issues relating to the propriety of instruction pursuant to California Jury Instructions, BAJI (8th ed.) BAJI No. 6.35 (Pet. App. Pages 33-34) and BAJI No. 6.36 (Pet. App. Page 35) and the appropriateness of conditional *res ipsa loquitur* instruction in professional negligence matters. The State Appellate Court closely followed the guidelines set forth in *Hale v. Venuto*, 137 Cal.App.3d 910 (1982). The

State Appellate Court accurately ruled, after thoughtful review of the trial testimony presented in the case, that Mitchell failed to establish the first condition, injury in absence of negligence, necessary to warrant conditional res ipsa loquitur instruction. Accordingly, the State Appellate Court correctly found that the Superior Court acted properly in refusing Mitchell's request for such instruction. The reasoning applied by the State Appellate Court to the BAJI No. 6.35 and BAJI No. 6.36 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

VI. THE STATE APPELLATE COURT CORRECTLY DECIDED THE ISSUES RELATING TO CALIFORNIA HEALTH & SAFETY CODE SECTION 1795.20

The State Appellate Court correctly decided the issues relating to the propriety of Mitchell's constitutional challenge to California *Health and Safety Code* Section 1795.20 (Pet. App. Page 28), as it was raised for the first time on her appeal to that Court. In following the dictates of *Jones v. Dutra Construction Co.*, 57 Cal.App.4th 871 (1988), and because Dr. Shain had no opportunity to defend the constitutionality of the statute during the Superior Court trial, the State Appellate Court correctly ruled that Mitchell could not challenge the statute for the first time on appeal. The reasoning applied by the State Appellate Court was sound, consistent with California law, and does not require review by this Court.

Notwithstanding the foregoing, it appears that Mitchell now argues that California *Health and Safety Code* Section 1795.20 is inconsistent with certain sections of the *Health Insurance Portability and Accountability Act*

("HIPAA") (Pet. App. Pages 27-28), 45 C.F.R. Parts 160 and 164. Her argument is flawed, as compliance by covered health care providers with HIPAA requirements was not mandated until April 14, 2003. [45 C.F.R. Section 164.534(a); Resp. App. 1] Although Mitchell relies on 9 Witkin, Cal. Proc. 4th (1997) Appeal, Section 956, p. 1001 (Pet. App. Page 29), which provides that a "decision correct when rendered will, . . . , lose its force as a precedent if a later statute changes the rule", she has completely misinterpreted the intention of the section. While a case may lose its force as *precedent* after a change in the law, the case would not necessarily be reversed just because of such change. Unless the new law as written is meant to apply retroactively, it will have no impact on previously decided cases. While HIPAA may indeed change the way health records are maintained in the future, Mitchell has provided no authority that its provisions were meant to apply retroactively. Because the Superior Court trial and the State Appellate Court opinion were decided prior to the effective date of HIPAA, Mitchell's request for retroactive application of the provisions of HIPAA to the issues raised in the Superior Court case is improper. This Court is respectfully requested to deny the Petition.

VII. THIS COURT IS NOT THE PROPER FORUM TO RAISE A DE NOVO CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Mitchell claims (Pet. Pages 27-30) that she lost the Superior Court case due to ineffective assistance of counsel. It is axiomatic that "[g]enerally, a plaintiff in a civil case has no right to effective assistance of counsel." [*Nicholson v. Rushen*, 767 F.2d 1426, 1427 (CA9 1985); *Watson v. Moss*, 619 F.2d 775, 776 (CA8 1980)] The proper

remedy in such a situation is to bring a malpractice claim against the prior attorney. [*Taylor v. Dickel*, 293 F.3d 427, 431 (CA8 2002)] Mitchell acknowledges (Pet. Page 7) that she has filed a malpractice action against her former attorney. Accordingly, any claim of ineffective assistance of counsel is subject to adjudication in that venue.

Notwithstanding the foregoing, and in claiming ineffective assistance of counsel, Mitchell revisits issues addressed by the State Appellate Court regarding (1) the propriety of BAJI No. 2.03 (Pet. App. Page 29), (2) the Superior Court decision to exclude certain expert testimony, and (3) the Superior Court decision regarding rebuttal testimony. The State Appellate Court correctly decided those issues in its opinion. In addressing the propriety of instruction pursuant to California Jury Instructions, BAJI (8th ed.) No. 2.03, the State Appellate Court applied the holding in *Null v. City of Los Angeles*, 206 Cal.App.2d 1528 (1988), and correctly decided that because neither party offered the instruction at the time of trial, the Superior Court was under no duty to instruct on its own motion. More importantly, and as the State Appellate Court appropriately found, any error committed in failing to give instruction under BAJI No. 2.03 would not support reversal of the judgment in favor of Dr. Shain. The reasoning applied by the State Appellate Court to the BAJI No. 2.03 issues raised by Mitchell was sound, consistent with California law, and does not require review by this Court.

The State Appellate Court properly decided the issues relating to the Superior Court decision to exclude certain expert testimony. The Superior Court reviewed the changes made to the deposition of Mitchell's expert and found that they did not add to or alter the essence of the

opinions disclosed at the time of the deposition. At the time of the Superior Court trial, Mitchell's expert acknowledged that x-rays submitted to him on the stand were not considered as a basis for his deposition opinions and withdrew his trial testimony in that regard. The Superior Court instructed the jury to disregard any testimony regarding those x-rays. The State Appellate Court appropriately applied the well-settled doctrine of invited error as set forth in *Norgart v. Upjohn Co.*, 21 Cal.4th 383 (1999) and the guidelines contained in *Jones v. Moore*, 80 Cal.App.4th 557 (2000) by upholding the Superior Court's correct decision to exclude such testimony. The reasoning applied by the State Appellate Court to the issues relating to the Superior Court decision to exclude certain expert testimony was sound, consistent with California law, and does not require review by this Court.

The State Appellate Court correctly decided the issues relating to the Superior Court decision regarding rebuttal testimony by Mitchell's expert. The State Appellate Court applied the mandates of *Code of Civil Procedure* Section 128(a)(3) (Resp. App. 1) and the ruling in *Cottle v. Superior Court*, 3 Cal.App.4th 1367 (1992) and correctly determined that the Superior Court was well within its discretion in limiting the evidentiary portion of the trial. The reasoning applied by the State Appellate Court to the issues relating to the Superior Court decision regarding rebuttal testimony by Mitchell's expert was sound, consistent with California law, and does require review by this Court.

VIII. MITCHELL HAS FAILED TO SET FORTH A CONSTITUTIONAL BASIS FOR REVIEW BY THIS COURT

Mitchell's Petition attempts to characterize the State Appellate Court ruling on the instructional and procedural errors raised in that venue as a deprivation of her liberty rights and due process rights under the 14th Amendment to the United States Constitution, a violation of equal protection laws, and an abridgment of her rights under the 1st Amendment to the United States Constitution. Mitchell's characterization is flawed. The Court "cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question". [*Gryger v. Burke*, 334 U.S. 728, 731 (1948)] In *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937), this Court pointed out that the "Constitution of the United States does not guarantee that the decision of state courts shall be free from error [citation omitted]; or require that pronouncements shall be consistent". In light of the foregoing, the perceived errors raised by Mitchell do not constitute a violation of constitutional guarantees and there are no issues in her petition which merit review by this Court.

Notwithstanding the foregoing, Dr. Shain submits that due process requirements were met in each venue of Mitchell's case. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'". [*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)] "The fundamental requirement of due process is

the opportunity to be heard 'at a meaningful time and in a meaningful manner'". [*Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)]

Mitchell's Petition (Pet. Pages 7-9) is replete with admissions establishing she received due process of law and the opportunity to be heard. Mitchell acknowledges that she filed a malpractice lawsuit against Dr. Shain on November 8, 1999, and in November of 2000, retained an attorney to represent her. She concedes that the Superior Court trial began on February 6, 2001, and the case was submitted to the jury on February 15, 2001, with a verdict in Dr. Shain's favor rendered on February 20, 2001. Mitchell admits that she filed a motion for a new trial and, after it was denied, a motion for reconsideration, which was also denied. Finally, Mitchell acquiesces that thereafter, she was able to avail herself of her due process rights by filing an appeal with the State Appellate Court and request review by the State Supreme Court. Unfortunately, she was unhappy with the ultimate outcome of the process. There was no denial of due process in this matter and there are no issues which merit review by this Court.

IX. CONCLUSION

The State Appellate Court was meticulous and thorough in its decision of this case, which addressed the material facts and issues of the case in a well-reasoned decision consistent with California law. The State Supreme Court, the Court of last resort in California, appropriately denied review of the State Appellate Court decision. Mitchell has failed to raise constitutional issues that merit review by this Court and has requested nothing

more than re-examination of the evidence presented and not presented during the Superior Court trial. Dr. Shain respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

45 C.F.R. § 164.534(a):

"(a) Health care providers. A covered health care provider must comply with the applicable requirements of this subpart no later than April 14, 2003."

California Code of Civil Procedure Section 128(a)(3):

"128.1(a) Every court shall have the power to do all of the following: . . . (3) To provide for the orderly conduct of proceedings before it, or its officers."